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No. 91-377

In the Supreme Court of the United States

OCTOBER TERM, 1991

TYRONE L. FRIESON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in view of petitioner's untruthful assertions to government officers and the district court regarding "related conduct," the district court properly denied him a reduction in offense level for acceptance of responsibility under Sentencing Guidelines § 3E1.1 despite his acknowledgement of culpability for the offense of conviction.

2. Whether the district court properly gave petitioner a four-level increase in his offense level under Sentencing Guidelines § 3B1.1 because of his leadership role in a crack cocaine distribution network involving five or more participants, notwithstanding that the narrow offense of conviction—one count of distribution of crack cocaine—involved fewer than five participants.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unpublished, but the judgment is noted at 934 F.2d 320 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1991. The petition for a writ of certiorari was filed on September 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following his plea of guilty in the United States District Court for the Southern District of West Virginia, petitioner was convicted of distributing cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1). The district court sentenced him to 210 months in prison, to be followed by five years of supervised release, and a $10,000 fine. C.A. App. A20-A23. The court of appeals affirmed. Pet. App. A1-A4.

1. The following activities gave rise to a 13-count federal indictment against petitioner and several of his co-conspirators.[1] During an investigation of crack cocaine distribution in Charleston, West Virginia, several informants identified petitioner as a supplier who often worked out of an apartment in a local housing project. He used the apartment as an informal base of operations where drug runners and customers could locate him. Gov't C.A. Br. 8-9.

During the summer and fall of 1988, petitioner supplied Virginia Straughter with crack cocaine to be sold in Charleston, and Straughter gave petitioner half the proceeds of her sales. Petitioner left Charleston periodically to replenish his supply of crack cocaine, and he gave Straughter the names of three persons to contact if she ran out of the drug in his absence. Gov't C.A. Br. 9.

Petitioner sold Irene Foye $100 of crack cocaine for Wynema Brown Hill on at least two occasions. Peti-

[1] The indictment named petitioner and seven others, and it charged conspiracy to distribute controlled substances, multiple substantive distribution offenses, and a firearms offense. Pet. App. A10-A16. Petitioner was named in the conspiracy count and two of the distribution counts. *Id.* at A11, A13-A15. On the government's motion, the district court dismissed the conspiracy count and one distribution count against petitioner at sentencing. C.A. App. A20.

tioner also gave Hill $25 of crack cocaine on another occasion. Gov't C.A. Br. 10. Between December 1988 and April 1989, moreover, a drug runner named George Carter obtained crack cocaine from petitioner approximately 10 to 15 times a day, three or four days a week. *Ibid.*

On April 22, 1989, Pam Hemphill, who was cooperating with law enforcement officers, negotiated with petitioner and Billy Cunningham to purchase $1,000 of crack cocaine. Hemphill made a purchase from Cunningham, who gave the proceeds to petitioner. Gov't C.A. Br. 10-11. Cunningham and his brother, Parker, also sold other packages of crack cocaine for petitioner. Gov't C.A. Br. 11. In addition, Parker once used petitioner's money to purchase 1.5 ounces of crack cocaine for petitioner in Toledo, Ohio. *Ibid.*

2. In the course of petitioner's presentence investigation, he initially refused to acknowledge having given more than a $20 rock of crack cocaine to Straughter. After being confronted with further evidence, however, petitioner admitted the extent of his dealings with her. Gov't C.A. Br. 9-10. At his sentencing hearing, petitioner claimed that he had not had any business dealings with Cunningham or Parker. The district court recessed the proceeding and heard testimony from Cunningham and Parker in which they outlined their dealings with petitioner. In addition, the government introduced a tape recording of the April 22, 1989, transaction involving petitioner, Cunningham, and Hemphill. Petitioner nevertheless continued to deny that he knew anything about Cunningham and Parker. Gov't C.A. Br. 12.

The district court found that petitioner had "dealt with a great number of participants, far more than

five, in the cocaine distribution network which he established." Pet. App. A5. The court therefore held that petitioner's adjusted offense level should be increased four levels under Sentencing Guidelines § 3B1.1(a), which is triggered when "the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive."

The district court also found that "although [petitioner] did make truthful admission * * * of his involvement in the count to which he entered his plea of guilty, he has consistently been untruthful * * * with respect to related conduct, except in those instances where it has been made plain to him that the government had information to the contrary." Pet. App. A6-A7. Hence, the court declined to make a downward adjustment in petitioner's offense level under Sentencing Guidelines § 3E1.1, which applies when "the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct."

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A4. First, based on "the government's representation about [petitioner's] reluctance to provide information during his debriefing and [petitioner's] own statements to the district court," the court of appeals concluded that the district court had not committed clear error in finding that petitioner had failed to accept responsibility. *Id.* at A2. Second, "because there was evidence of participation by at least five people whose activities were directed by [petitioner]," the court discerned no clear error in the district court's determination that petitioner was an organizer or leader in criminal activity involving five or more participants. *Id.* at A3.

ARGUMENT

1. Petitioner contends that he is entitled to a downward adjustment in his offense level pursuant to Sentencing Guidelines § 3E1.1 because he accepted responsibility for the offense of conviction. Pet. 10-12.

Petitioner does not contest the district court's factual finding that he had "consistently been untruthful with the government with respect to related conduct, except in those instances where it has been made plain to him that the government had information to the contrary." Pet. App. A7. Nor does he dispute the district court's factual determination that, because he continued to maintain that he had not had any involvement with Parker and Cunningham, petitioner was being "untruthful * * * up to this date." *Ibid.* Rather, petitioner argues that his entitlement to an acceptance of responsibility reduction must be evaluated exclusively by reference to his offense of conviction (*i.e.*, the single cocaine base distribution offense charged in Count 7), and not by reference to the other conduct in which he was engaged as part of a common plan or scheme (*i.e.*, his cocaine distribution network). His contention, however, is contrary to the scheme of the Sentencing Guidelines in general and to Guidelines § 3E1.1 in particular.

Petitioner does not dispute that a sentencing court may look beyond the specific offense of conviction in determining the base offense level pursuant to the Guideline for ordinary drug trafficking offenses, Guidelines § 2D1.1. Nonetheless, he argues that a wholly different regime applies when the district court evaluates a claim of acceptance of responsibility under Guidelines § 3E1.1. Pet. 10-12. The Guidelines, however, contradict his contention. Section 1B1.2(b) of the Guidelines explicitly directs courts to

"determine the applicable guideline range in accordance with § 1B1.3." Section 1B1.3, in turn, defines "Relevant Conduct (Factors that Determine the Guideline Range)." With respect to drug distribution and certain other types of offenses, Section 1B1.3 provides that both specific offense characteristics under Chapter 2 (*e.g.*, drug quantity under Guidelines § 2D1.1) and adjustments under Chapter 3 (*e.g.*, a defendant's acceptance of responsibility under Guidelines § 3E1.1) are to be based on "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." Guidelines § 1B1.3(a)(2).[2]

Petitioner's narrow view of Guidelines § 3E1.1 is also at odds with the Guideline itself. First, the application notes to Guidelines § 3E1.1 provide that an "appropriate consideration[]" in determining the Guideline's applicability is a defendant's "voluntary and truthful admission to authorities of involve-

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[2] The application notes to Guidelines § 1B1.2 confirm the Commission's intent in this regard. Application Note 2 explains that, "once it has determined the applicable guideline (*i.e.*, the applicable guideline section from Chapter Two)," the sentencing court must "determine any applicable specific offense characteristics (under that guideline), and any other relevant sentencing factors pursuant to the relevant conduct definition in § 1B1.3." Guidelines § 1B1.2, Application Note 2. Application Note 3 similarly makes clear that "[i]n many instances, it will be appropriate that the court consider the actual conduct of the offender, even when such conduct does not constitute an element of the offense," such as "when it considers various adjustments." Guidelines § 1B1.2, Application Note 3 (citing Guidelines § 1B1.3 (Relevant Conduct)). Moreover, Guidelines § 1B1.3 itself requires that all relevant conduct be considered "unless otherwise specified." Nothing in Guidelines § 3E1.1 suggests that the sentencing court is forbidden to consider "all relevant conduct" when determining whether the defendant has accepted responsibility for his criminal conduct.

ment in the offense *and related conduct*." Guidelines § 3E1.1, Application Note 1(c) (emphasis added). Second, whereas Guidelines § 3E1.1(a), as originally promulgated, provided for a reduction in offense level if a defendant accepted responsibility for "the offense of conviction," the Commission has amended that Guideline "by deleting 'the offense of conviction' and inserting in lieu thereof 'his criminal conduct.'" Guidelines, App. C.20, amendment 46 (effective Jan. 15, 1988).

As petitioner notes, Pet. 10-11, some courts of appeals have held that it is improper for a sentencing court to consider whether the defendant has accepted responsibility for conduct beyond the offense of conviction. See, *e.g.*, *United States* v. *Piper*, 918 F.2d 839, 840-841 (9th Cir. 1990) (discussing conflict in authority). The conflict between those decisions and the decision in this case, however, does not warrant this Court's review.

A clarifying amendment to Guidelines § 3E1.1, which took effect on November 1, 1990, confirms that a district court's determination on the issue of acceptance of responsibility may take into account conduct beyond the offense of conviction. The amendment deleted Application Note 3, which stated:

> A guilty plea may provide some evidence of the defendant's acceptance of responsibility. However, it does not, by itself, entitle a defendant to a reduced sentence under this section.

Guidelines, App. C.196, amendment 351 (effective Nov. 1, 1990). In its place, the amendment inserted a revised Application Note 3, which reads as follows:

> Entry of a plea of guilty prior to the commencement of trial combined with truthful admission

> of involvement in the offense *and related conduct* will constitute significant evidence of acceptance of responsibility for the purposes of this section. However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility.

Ibid. (emphasis added). This amendment makes clear that, in addition to the defendant's pleading guilty to the offense of conviction *and* admitting "involvement in the offense," the district court may take into account the defendant's "admission of involvement * * * in related conduct." The revision therefore indicates that admissions of "related conduct" encompass more than simply admissions relating to "the offense" itself.

As part of the same November 1990 amendment, moreover, the Commission amended the background commentary to Guidelines § 3E1.1. That commentary had previously explained why a defendant is entitled to more lenient punishment when he or she accepts responsibility "for the offense." It was amended as of November 1990 to explain that leniency is warranted when a defendant has accepted responsibility "for the offense and related conduct." Guidelines, App. C.196, amendment 351 (effective Nov. 1, 1990).

The amendments to the Guidelines leave little room for doubt that Guidelines § 3E1.1 permits the district court to consider related conduct in determining whether to reduce the offense level for acceptance of responsibility. The amendments therefore should eliminate any confusion as to the intended scope of Guidelines § 3E1.1.[3] As a result, the conflict

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[3] It is true that Application Note 1(c) had previously stated that the district court could appropriately consider

among the circuits on this issue is not likely to continue in cases in which defendants are sentenced for offenses committed after the effective date of the November 1990 amendments to Guidelines § 3E1.1. Petitioner has not cited, and we are unaware of, any decision that has applied those amendments and held that a sentencing court may consider only the offense of conviction in deciding whether Guidelines § 3E1.1 applies.[4] Hence, further review of the decision

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"voluntary and truthful admission to authorities of involvement in the offense and related conduct." Guidelines § 3E1.1 Application Note 1(c). The November 1990 clarifying amendment, however, not only reemphasized the relevance of "related conduct" to the application of Guidelines § 3E1.1, but also eliminated any ambiguity arising from the prior background commentary, which had explained the appropriateness of imposing a lesser sentence when a defendant had "demonstrate[d] a recognition and affirmative acceptance of personal responsibility for the offense." Guidelines, App. C.196, amendment 351.

[4] Some decisions have concluded that it would violate the Fifth Amendment to interpret Guidelines § 3E1.1 to require a defendant to accept responsibility for criminal conduct other than that which underlies the offense of conviction. See, *e.g.*, *United States* v. *Oliveras*, 905 F.2d 623, 626-628 (2d Cir. 1990); *United States* v. *Perez-Franco*, 873 F.2d 455, 463 (1st Cir. 1989). That issue, however, is not presented in this case. Petitioner has not contended that denying him an acceptance of responsibility reduction under the circumstances of this case violated his privilege against compelled self-incrimination. His plea agreement, moreover, expressly provided that "[n]othing contained in any statement or testimony given by defendant pursuant to this agreement or any evidence developed therefrom will be used in any further criminal prosecutions or in determining the applicable guideline range under the Federal Sentencing Guidelines unless this agreement becomes void due to violation of any of its terms by defendant." C.A. App. A40-A41.

In addition, because petitioner was denied an adjustment based on the district court's conclusion that he had been

below is unwarranted. See *Braxton* v. *United States*, 111 S. Ct. 1854, 1857-1858 (1991) (because Congress contemplated that the Commission would periodically "make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest," this Court will be "more restrained and circumspect" in granting review to resolve such conflicts).

"untruthful," Pet. App. A7, this case is not a good vehicle for addressing the Fifth Amendment implications of Guidelines § 3E1.1. As one court of appeals explained in similar circumstances:

> The district judge made a credibility determination that was not clearly erroneous. We therefore need not reach the fifth amendment issue. Should some future [defendant] demonstrate sincerity and remorse while at the same time he declines to expound upon other criminal conduct because of a concern with self-incrimination, then perhaps the issue will be squarely presented.

United States v. *Taylor*, 937 F.2d 676, 681 (D.C. Cir. 1991); accord *United States* v. *Frierson*, No. 90-3382 (3d Cir. Oct. 1, 1991), slip op. 28-29; cf. *United States* v. *Lawrence*, 918 F.2d 68, 72 (8th Cir. 1990) (obstruction of justice enhancement case). We recognize that two Second Circuit cases cited by petitioner, Pet. 10, invoked the Fifth Amendment in interpreting Guidelines § 3E1.1 narrowly, despite findings that the respective defendants' denials of related conduct were not credible, *United States* v. *Santiago*, 906 F.2d 867, 870, 873 (2d Cir. 1990), or not candid, *Oliveras*, 905 F.2d at 625, 626-632. But as this Court has made clear, "it cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Bryson* v. *United States*, 396 U.S. 64, 72 (1969) (footnote omitted). Therefore, even if petitioner had invoked the Fifth Amendment here and had not had his statements expressly immunized pursuant to his plea agreement, the Fifth Amendment issue would not warrant this Court's review.

2. Petitioner next contends that the district court erred in enhancing his offense level based on his leadership role in a cocaine distribution network having more than five participants. Pet. 12-16. The evidence at petitioner's sentencing hearing, however, established that petitioner had a leadership role in a course of criminal activity—supplying crack cocaine—that involved more than five participants. See Gov't C.A. Br. 8-11; C.A. App. A226-A227. Hence, the district court properly found, Pet. App. A5, that petitioner's offense level should be enhanced four levels under Guidelines § 3B1.1(a), which applies "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." The court of appeals correctly held, Pet. App. A3, that that finding was not clearly erroneous.

As with his previous claim of error, petitioner does not dispute the factual predicate of the district court's sentencing decision. Rather, he argues that the court should have focused solely upon the offense of conviction, and not upon conduct that was part of the same course of conduct or common scheme or plan, in applying Guidelines § 3B1.1(a). His position, however, is again at odds with the Guidelines.

As noted, adjustments under Chapter 3 of the Guidelines—including role-in-the-offense adjustments—for offenses such as the one in this case are to be based on "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." Guidelines § 1B1.3(a)(2); see also Guidelines § 1B1.2, Application Notes 2, 3. In addition to those general provisions, the introductory commentary to Guidelines, Chapter 3, Part B, includes the caveat:

> The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of § 1B1.3 (Relevant Conduct), *i.e.*, all conduct included under § 1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction.

The foregoing passage—which was inserted as a clarifying amendment to take effect as of November 1, 1990, Guidelines, App. C.189, amendment 345—on its face eliminates any doubt that role-in-the-offense adjustments are to be based on all relevant conduct, and not merely the offense of conviction.

As petitioner observes, several other courts of appeals have taken a narrower approach than the one adopted by the court of appeals in this case. See Pet. 13 (citing cases); see also *United States* v. *Fells*, 920 F.2d 1179, 1183-1184 n.6 (4th Cir. 1990) (citing cases differing with the law of the Fourth Circuit), cert. denied, 111 S. Ct. 2831 (1991). Despite that conflict of authority, however, further review is unwarranted because the November 1990 clarifying amendment resolves the issue in a manner that should eliminate that conflict in the future.

Thus, in *United States* v. *Murillo*, 933 F.2d 195, 200 (1991), the Third Circuit held that it would adhere to its narrower view of role-in-the-offense determinations for offenses committed prior to November 1, 1990, but would apply the broader "relevant conduct" standard to all offenses committed thereafter. Similarly, while the Ninth Circuit construed Guidelines § 3B1.1 narrowly in *United States* v. *Zweber*, 913 F.2d 705 (1990), see Pet. 13, that court later relied on the clarifying amendment to disavow what it referred to as "dicta" from *Zweber* and to hold that role adjustments under Guidelines § 3B1.1 are not limited to the offense of conviction.

United States v. *Lillard*, 929 F.2d 500, 503 (9th Cir. 1991); accord *United States* v. *Lanese*, 937 F.2d 54, 56-57 (2d Cir. 1991) (relying on the November 1990 amendment to reject the offense-of-conviction limitation adopted in its prior decision in *United States* v. *Lanese*, 890 F.2d 1284, 1293 (2d Cir. 1989), cert. denied, 110 S.Ct. 2207 (1990)); *United States* v. *Mir*, 919 F.2d 940, 945 (5th Cir. 1990) (citing the clarifying amendment in rejecting the narrow construction of Guidelines § 3B1.1 in *United States* v. *Barbontin*, 907 F.2d 1494 (5th Cir. 1990)).[5] Finally, petitioner has cited, and we are aware of, no case construing the November 1990 amendment in a manner that would restrict a sentencing court to the offense of conviction in making determinations regarding the defendant's role in the offense. For that reason, the conflict among the circuits cited by petitioner is confined to cases arising under the pre-November 1990 version of Section 3B1.1 of the Guidelines, and therefore will

[5] Petitioner argues that, despite the November 1990 amendment, the Fifth Circuit has adhered to a middle position in conflict with the decision below. Pet. 14. In *United States* v. *Rodriguez*, 925 F.2d 107, 110 (1991), however, the Fifth Circuit made clear that in cases such as this one, which are subject to the relevant conduct definition of Guidelines § 1B1.3(a)(2), the sentencing court may take into account "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." Because the district court in this case took into account the participants in the cocaine distribution network established by petitioner, and found that all the cocaine base attributable to petitioner arose from a common plan or scheme, Pet. App. A5-A6, it is clear that the role in the offense increase in this case complies with post-amendment Fifth Circuit law.

be of diminishing importance in the future. Further review of this issue is therefore unwarranted.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] This Court recently denied certiorari in a case raising the same issue presented here. See *Fells* v. *United States*, 111 S. Ct. 2831 (1991).

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